

**STATE OF CALIFORNIA
REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION**

IN THE MATTER OF:)	AMENDED COMPLAINT NO.
		R2-2002-0051
MISAWA HOMES (USA), INC.)	FOR
HIDDENBROOKE PREMIER GOLF)	ADMINISTRATIVE CIVIL LIABILITY
& CLUBHOUSE)	
1095 HIDDENBROOKE PARKWAY)	
VALLEJO, CA 94591)	
_____)	

YOU ARE HEREBY GIVEN NOTICE THAT:

1. Misawa Homes (USA), Inc. (hereinafter the Discharger) has violated provisions of law for which the California Regional Water Quality Control Board, San Francisco Bay Region (hereinafter the Regional Board), may impose liability pursuant to Sections 13385 and 13323 of the California Water Code (CWC).

2. Unless waived, a hearing concerning the Complaint will be held before the Regional Board on October 16, 2002, at the Elihu M. Harris State Building, First Floor Auditorium, located at 1515 Clay Street, Oakland, California. The meeting begins at 9:00 a.m. The Discharger or its representative will have an opportunity to be heard and to contest the allegations in the Complaint and the imposition of civil liability by the Regional Board. An agenda for the meeting will be mailed to the Discharger not less than 10 days before the hearing date. Should the Discharger decide to contest the Complaint, all testimony and evidence to be offered at the hearing is due by **5:00 p.m. on October 4, 2002**. The Regional Board will not consider any testimony and/or evidence not submitted by this deadline.

3. At the October 16, 2002, hearing, the Regional Board will consider whether to affirm, reject, or modify the proposed administrative civil liability or whether to refer the matter to the Attorney General for recovery of judicial civil liability.

ALLEGATIONS

4. The Discharger violated the prohibition in CWC Section 13376 against discharging pollutants except as authorized by a National Pollutant Discharge Elimination System (NPDES) permit, for which the Regional Board can administratively assess civil liability under CWC Section 13385(a)(1).
5. The Complaint is based on the following facts:
 - a. The Discharger discharged a pollutant, sulfur dioxide, into Upper Sky Valley Lake (hereinafter the Lake), which falls within the federal definition of "navigable waters of the United States" without first obtaining an NPDES permit. Specifically, for up to 18 days, from April 9 to April 26, 2000, the Discharger discharged sulfur dioxide into the Lake, which caused the Lake's pH levels to drop from historical ranges of 6.4 to 9.5 to highly acidic ranges of 3.0 to 3.4, resulting in acute toxicity to aquatic and riparian organisms. According to the Discharger, it discharged the sulfur dioxide in an effort to enhance the aesthetic quality of the golf course and to reduce fertilizer and fungicide use. CWC Section 13376 prohibits the discharge of pollutants except as authorized by waste discharge requirements.
 - b. The Lake is located on Sulphur Springs Creek, which flows to Lake Herman, a standby drinking water source for the City of Benicia. The Lake's area consists of approximately 9.8 acres of jurisdictional waters of the United States, 8.6 acres of open waters and 1.2 acres of seasonal wetlands, and provides valuable aquatic habitat.

- c. The Discharger's discharge resulted in exceedances of the Basin Plan's water quality objective for surface water toxicity, which provides, "[a]ll waters shall be maintained free of toxic substances in concentrations that are lethal to or that produce other detrimental responses in aquatic organisms."
- d. On April 24, 2000, Vallejo Sanitation and Flood Control District (VSFCD) staff conducted their routine quarterly sampling of the Lake. On April 25, 2000, VSFCD staff returned to obtain a 24-hour composite sample and to gather additional grab samples. Six of the seven samples gathered at the Lake had pH levels between 3.0 and 3.4. While obtaining these samples, VSFCD staff observed approximately 10-15 dead tadpoles and adult frogs in and around the Lake. At the same time, VSFCD noticed that the Discharger was injecting sulfur dioxide into the Lake. Immediately VSFCD contacted the Discharger and informed it that the injection was unauthorized and may need a permit. Therefore, the Discharger was advised to disconnect the sulfur dioxide injection system immediately. When the Discharger refused to disconnect the sulfur dioxide injection system, VSFCD staff immediately contacted Regional Board staff for assistance.
- e. On April 26, 2000, Regional Board staff contacted the Discharger and informed it that it was in violation of the prohibition in CWC Section 13376 against discharging pollutants except as authorized by an NPDES permit. As such, discharges from the sulfur dioxide injection system were subject to fines of up to \$10,000 per day for each day of violation. The Discharger subsequently disconnected the sulfur dioxide injection system.
- f. On April 27, 2000, VSFCD conducted a 96-hour static bioassay test with grab samples obtained from the Lake after sulfur dioxide had been injected, which resulted in 100% fish mortality within the first 3 hours of the test. These results confirmed the acute toxicity of the Lake water.

- g. On April 28, 2000, VSFCD issued a Notice of Violation to the Discharger for violation of the District's Storm Water Discharge Ordinance #99-71 for using a sulfur dioxide injection system to lower the pH level of the Lake. Additionally, United States Fish and Wildlife Service (USFWS) staff conducted a field survey around the perimeter of the Lake on that day and collected tadpoles for analysis; based upon their observations and findings, USFWS staff estimated that at least 200 bullfrogs and tadpoles had died around the Lake, with more mortalities in the Lake. Additionally, USFWS staff expects that all California red-legged frogs present would have dissolved entirely in the impacted waters.

PROPOSED CIVIL LIABILITY

6. As provided by CWC Section 13385(c)(1), the Regional Board can administratively assess civil liability pursuant to CWC Section 13323 in the amount not to exceed the sum of both of the following: 1) \$10,000 for each day in which a violation of CWC Section 13376 occurs; and 2) an additional liability not to exceed \$10.00 multiplied by the number of gallons discharged in excess of 1,000 gallons that is not susceptible to cleanup or is not cleaned up. The Discharger violated CWC Section 13376 for 18 days (April 9 to April 26, 2000, inclusive). The number of gallons of discharge in excess of 1,000 gallons that was not cleaned up or is not susceptible to cleanup is unknown; therefore, civil liability based on volume of discharge is not being sought.
7. Pursuant to CWC Section 13385(e), the Regional Board must consider the following factors in determining the amount of civil liability: "the nature, circumstances, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or

savings, if any, resulting from the violation, and other matters that justice may require.”

In addition, Section 13385(e) states, “At a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation.”

8. After consideration of the above factors as set forth in the attached Staff Report, incorporated herein by this reference, the Executive Officer proposes that civil liability be imposed on the Discharger in the amount of \$147,000.00 for the violation cited above. This includes \$140,000.00 as an assessment for the violation, and \$7,000.00 for staff costs.
9. The Discharger has requested that \$115,000 of the amount be suspended pending accomplishment of a supplemental environmental project acceptable to the Executive Officer. The Discharger must submit to this Board a proposal for such a project by November 8, 2002. If the proposed project is not acceptable, the Discharger has 30 days from receipt of notice of rejection of submittal, to either submit a new or revised proposal or submit payment for the full amount suspended. The accepted project must be funded by 50% by January 15, 2003 and by 100% by May 1, 2003. Any money not used by May 1, 2003 must be submitted to this Board and made payable to the State Cleanup and Abatement Account or directed toward an alternative project acceptable to the Executive Officer.
10. Issuance of the Complaint is exempt from the provisions of the California Environmental Quality Act (Public Resources Code Section 21000, et seq.), in accordance with Section 15321(a)(2), Title 14, of the California Code of Regulations.

If you should have any questions, please contact Greg Bartow at (510) 622-2315.

September 30, 2002

Date

Loretta K. Barsamian

Loretta K. Barsamian

Executive Officer